Ng Peng Seng v Public Prosecutor and another appeal

A

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS J-05(M)-217–08 OF 2015 AND J-05(M)-223–08 OF 2015
MOHTARUDIN BAKI, TENGKU MAIMUN AND ABDUL KARIM JJCA
11 JANUARY 2017

B

Criminal Law — Dangerous Drugs Act 1952 — s 39B(2) — Trafficking — Trafficking of 283.92g of heroin and 97.10g of monoacetylmorphines — Appeal against conviction and sentence — Drugs found in car driven in a suspicious manner by first appellant with second appellant as front passenger — Whether possession established — Whether element of trafficking proved under ss 2 and 37(da) of the Dangerous Drugs Act 1952 ('the DDA') — Whether failure to adequately consider defence — Whether accused had given sufficient explanation for their conduct of running away from scene of crime — Whether conviction not safe

C

D

E

Evidence — Relevancy — Evidence relating to facts in issue — Conduct of accused — Accused running away when approached by police — Whether accused offered sufficient explanation for conduct in running away — Whether such explanation credible — Evidence Act 1950 s 9

F

The appellants were convicted and sentenced to death by the High Court for trafficking in 283.92g of heroin and 97.10g of monoacetylmorphines, an offence punishable under s 39B(2) of the Dangerous Drugs Act 1952 ('the DDA') read with s 34 of the Penal Code. Sarjan Samsaimee ('SP6') and Kpl Rahimi ('SP7') were on duty when they noticed a car driven in a suspicious manner by the first appellant. The second appellant was the front passenger. SP6 and SP7 stopped and searched the car and found the dangerous drugs. Both the appellants were said to be 'gelisah'. The first appellant was said to 'minta tolong' and 'minta settle'. Both the appellants attempted to flee. The first appellant was immediately arrested. The second appellant fled with the car and crashed into a lorry. He then fled on foot but was subsequently arrested. From the conduct of the appellants, the learned trial judge ('judge') found that they were in possession of the drugs in the boot of the car and that the element of trafficking had been proved under ss 2 and 37(da) of the DDA. The appellants' defence essentially was that they had no knowledge of the drugs found in the boot of the car. The first appellant testified that the car was borrowed from her boyfriend, Michael. The second appellant gave similar evidence. The second appellant testified that when he borrowed the car from Michael, he did not check the boot of the car. He only checked the meter box

G

H

I

and oil filter. The second appellant explained that he fled after the police had discovered the drugs in the boot as he was afraid. The judge found that the defence of both the appellants had failed to raise a reasonable doubt on the prosecution's case and thus convicted and sentenced the appellants. Hence the present appeals. The first appellant claimed that the judge erred in respect of his findings regarding the element of trafficking by invoking both ss 2 and 37(da) of the DDA. Citing the case of *Abdul Aziz a/l Jamal v Public Prosecutor* [2016] MLJU 1606, it was submitted that the judge erred in failing to make a specific finding of whether trafficking was proved by way of direct evidence or presumption. It was further contended that the judge failed to sufficiently evaluate the defence, in particular, that the first appellant had no knowledge of the drugs and that there was no evidence as to how long the car was used by the first appellant prior to her arrest. The second appellant contended that the second appellant had no custody and control of the car and could not be said to have custody and control of the drugs in the car. It was also contended that the second appellant's conduct in fleeing, at the highest there was knowledge but not custody and control of the drugs. The second appellant also claimed that the judge had failed to consider the explanation given by the second appellant as to why he fled.

Held, allowing the appeals and setting aside the conviction and sentence and substituting with one of possession under s 12(2) of the DDA:

(1) The judge failed to adequately consider the defence. The facts and circumstances of the present appeals fit into the judgment of the Federal Court in the case of *Ibrahim bin Mohamad dan satu lagi lwn Pendakwa Raya* [2011] MLJU 1491. The Federal Court in *Ibrahim*'s case found that both the accused had given sufficient explanation as to their conduct of running away from the scene of the crime. The Federal Court ruled that both the accused had discharged the onus of explaining their conduct as provided for under s 9 of the Evidence Act 1950. It was not safe to sustain the conviction on the charge of trafficking against both the appellants on similar grounds as stated in *Ibrahim*'s case (see paras 33 & 35–36).

(2) Although the identity of Michael was only raised at the defence case and was thus correctly labelled by the judge as an afterthought and a recent invention, quite apart from the issue of Michael, the judge had failed to consider that from the evidence before the court, it was clear that neither the first nor the second appellant was the owner of the car (see para 37).

(3) As for conduct, the first appellant had challenged the prosecution's version and even if the court were to accept the prosecution's evidence that the first appellant 'minta tolong' and 'minta settle', there was no evidence to establish that the words uttered was in specific reference to the drugs found in the boot of the car. An inference favourable to the first

appellant may be drawn that the words uttered were in relation to the manner she was driving the car (see para 38). A

(4) Further, similar to the facts in *Ibrahim*'s case, the appellants, upon noticing the police patrol car at the Highway, could have accelerated without stopping if they had knowledge of the drugs in the boot of the car. But they co-operated with the police and the second appellant had given his explanation that he only fled upon hearing about the drugs from the police, which explanation was not considered by the judge. As in *Ibrahim*'s case, the second appellant had discharged the onus of explaining his conduct under s 9 of the Evidence Act 1950 (see para 39). B C

[Bahasa Malaysia summary

Perayu-perayu telah disabitkan dan dihukum mati oleh Mahkamah Tinggi kerana mengedar 283.92g heroin dan 97.10g monoacetylmorphines, satu kesalahan yang boleh dihukum di bawah s 39(2) Akta Dadah Berbahaya 1952 ('ADB') dibaca bersama s 34 Kanun Keseksaan. Sarjan Samsaimee ('SP6') dan Kpl Rahimi ('SP7') sedang bertugas apabila mereka menyedari kereta yang dipandu dalam cara yang menimbulkan syak wasangka oleh perayu pertama. Perayu kedua merupakan penumpang hadapan. SP6 dan SP7 telah menahan dan memeriksa kereta itu dan menemui dadah berbahaya. Kedua-dua perayu telah dikatakan kelihatan gelisah. Perayu pertama dikatakan 'minta tolong' dan 'minta settle'. Kedua-dua perayu cuba untuk melarikan diri. Perayu pertama telah ditangkap dengan serta merta. Perayu kedua telah melarikan diri dengan kereta dan merempuh lori. Dia kemudian berlari tetapi akhirnya ditangkap. Berdasarkan perlakuan perayu-perayu, hakim perbicaraan yang bijaksana ('hakim') mendapati bahawa mereka memiliki dadah dalam but kereta dan bahawa elemen pengedaran telah dibuktikan di bawah ss 2 dan 37(da) ADB. Pembelaan perayu-perayu pada dasarnya adalah bahawa mereka tidak mempunyai pengetahuan tentang dadah yang ditemui dalam but kereta itu. Perayu pertama telah memberi keterangan bahawa kereta itu dipinjam daripada teman lelakinya, Michael. Perayu kedua telah memberi keterangan yang sama. Perayu kedua telah memberi keterangan bahawa apabila dia meminjam kereta itu daripada Michael, dia tidak memeriksa but kereta itu. Dia hanya memeriksa kotak meter dan penapis minyak. Perayu kedua menjelaskan bahawa dia melarikan diri selepas polis menemui dadah dalam but itu kerana dia berasa takut. Hakim mendapati bahawa pembelaan kedua-dua perayu-perayu telah gagal menimbulkan keraguan munasabah berhubung kes pendakwaan dan oleh itu mensabitkan dan menghukum perayu-perayu. Justeru rayuan-rayuan ini. Perayu pertama mendakwa bahawa hakim terkhilaf berkenaan penemuan beliau berkaitan elemen pengedaran dengan menggunakan kedua-dua ss 2 dan 37(da) ADB. Dengan memetik kes *Abdul Aziz a/l Jamal v Public Prosecutor* [2016] MLJU 1606, ia dihujahkan bahawa hakim telah terkhilaf kerana gagal membuat penemuan spesifik berhubung sama ada pengedaran telah dibuktikan melalui keterangan secara D E F G H I

langsung atau secara andaian. Ia selanjutnya dihujahkan bahawa hakim telah gagal untuk menilai sewajarnya pembelaan itu, khususnya, bahawa perayu pertama tidak mempunyai pengetahuan tentang dadah itu dan bahawa tiada keterangan tentang berapa lama kereta itu telah digunakan oleh perayu pertama sebelum tangkapannya. Perayu kedua telah berhujah bahawa perayu kedua tidak mempunyai jagaan dan kawalan ke atas kereta itu dan tidak boleh dikatakan mempunyai jagaan dan kawalan ke atas dadah dalam kereta. Ia juga dihujahkan bahawa perlakuan perayu kedua dalam melarikan diri, paling tidak mempunyai pengetahuan tetapi tidak mempunyai kawalan dan jagaan ke atas dadah itu. Perayu kedua juga mendakwa bahawa hakim telah gagal mengambil kira penjelasan yang diberikan oleh perayu kedua berhubung sebab dia melarikan diri.

Diputuskan, membenarkan rayuan-rayuan dan mengetepikan sabitan dan hukuman dan menggantikannya dengan milikan di bawah s 12(2) ADB:

(1) Hakim gagal untuk mengambil kira sewajarnya pembelaan itu. Fakta dan keadaan rayuan-rayuan ini sepadan dengan penghakiman Mahkamah Persekutuan dalam kes *Ibrahim bin Mohamad dan satu lagi lwn Pendakwa Raya* [2011] MLJU 1491. Mahkamah Persekutuan dalam kes *Ibrahim* mendapati bahawa kedua-dua tertuduh telah memberikan penjelasan yang mencukupi berhubung perlakuan mereka melarikan diri daripada tempat kejadian jenayah. Mahkamah Persekutuan memutuskan bahawa kedua-dua tertuduh telah melepaskan beban menjeaskan perlakuan mereka sepertimana diperuntukkan di bawah s 9 Akta Keterangan 1950. Ia tidak selamat untuk mengekalkan sabitan berhubung pertuduhan pengedaran terhadap kedua-dua perayu atas alasan sama seperti dinyatakan dalam kes *Ibrahim* (lihat perenggan 33 & 35–36).

(2) Walaupun identiti Michael hanya ditimbulkan semasa kes pembelaan dan oleh itu telah dilabelkan dengan betul oleh hakim sebagai suatu yang telah difikirkan kemudian dan ciptaan terkini, yang mana berbeza denan isu Michael, hakim telah gagal mempertimbangkan bahawa berdasarkan keterangan di hadapan mahkamah, ia adalah jelas bahawa perayu pertama mahu pun perayu kedua bukan pemilik kereta itu (lihat perenggan 37).

(3) Berhubung perlakuan, perayu pertama telah mencabar versi pendakwaan dan jika pun mahkamah menerima keterangan pendakwaan bahawa perayu pertama 'minta tolong' dan 'minta settle', tidak terdapat keterangan untuk membuktikan bahawa perkataan-perkataan yang diungkap itu memberi rujukan spesifik kepada dadah yang ditemui dalam but kereta itu. Inferens yang boleh menyebelahi perayu pertama boleh dibuat bahawa perkataan-perkataan yang diungkapkan adalah berkaitan cara dia memandu kereta itu (lihat perenggan 38).

(4) Selanjutnya, fakta yang serupa dengan kes *Ibrahim*, perayu-perayu

setelah menyedari kereta peronda polis di lebuhraya itu, telah memandu laju tanpa berhenti jika mereka mengetahui tentang dadah dalam but kereta itu. Namun mereka memberi kerjasama dengan polis dan perayu kedua telah memberikan penjelasan bahawa dia hanya melarikan diri setelah mendengar tentang dadah itu daripada polis tersebut, yang mana penjelasan tidak diambil kira oleh hakim. Sepertimana dalam kes *Ibrahim*, perayu kedua telah melepaskan beban menjelaskan perlakuannya di bawah s 9 Akta Keterangan 1950 (lihat perenggan 39).]

Notes

For cases on evidence relating to facts in issue, see 7(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2979–2983.
For cases on s 39B(2), see 4(1) *Mallal's Digest*, (5th Ed, 2015) paras 716–732.

Cases referred to

Abdul Aziz a/l Jamal v PP [2016] MLJU 1606; [2016] 6 CLJ 485, CA (refd)
Ibrahim bin Mohamad dan satu lagi lwn Pendakwa Raya [2011] MLJU 1491; [2011] 4 CLJ 113, FC (consd)
Lany Masangkay Magnaye lwn Pendakwa Raya dan satu lagi rayuan [2016] MLJU 1607; [2016] 4 CLJ 64, CA (refd)

Legislation referred to

Criminal Procedure Code s 289
Dangerous Drugs Act 1952 ss 2, 6, 12(2) 37(da), (da)(iiia), 39A(2), 39B(1)(a), (2), First Schedule
Evidence Act 1950 ss 8, 9
Penal Code s 34

Appeal from: Criminal Trial Nos 45A-09–03 of 2012 and 45A-08–03 of 2012 (High Court, Muar)

Hisyam Teh Poh Teik (Hisyam Teh Poh Teik) for the first appellant.
Fadhli Sutris (Lim Gary & Fadhli Sutris) for the second appellant.
Nadia Hanim Mohd Tajuddin (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Tengku Maimun JCA (delivering judgment of the court):

[1] Lau Fong Yee ('the first appellant') and Ng Peng Seng ('the second appellant') were the first accused and the second accused respectively in the High Court. They were convicted and sentenced to death by the High Court at Muar for trafficking in 283.92g of heroin and 97.10g of monoacetylmorphines, an offence punishable under s 39B(2) of the Dangerous Drugs Act 1952 ('the Act') read with s 34 of the Penal Code ('the trafficking charge'). The offence was said to be committed on 29 November

2011 at about 3.45pm at KM 160, Arah Selatan, Lebuhraya Utara Selatan, Ledang, Johor.

[2] The first appellant was also convicted and sentenced to three years and two years imprisonment for being in possession of 5.88g methamphetamine and 0.04g nimetazepam respectively, an offence under s 12(2) punishable under s 39A(2) of the Act ('the possession charges').

[3] Aggrieved by the decision of the High Court, the appellants appealed to this court. We had unanimously allowed the appeal, set aside the order of the High Court on the trafficking charge and substituted with an order of possession under s 12(2) punishable under s 39A(2) of the Act against both the appellants.

[4] Having heard the submissions of learned counsel and learned DPP, we sentenced both the appellants to 18 years imprisonment from the date of arrest. No whipping was imposed on both the appellants as s 289 of the Criminal Procedure Code forbids whipping by virtue of the first appellant being a female and the second appellant being more than 50 years of age. We affirmed the convictions and sentences of the High Court against the first appellant on the possession charges.

[5] We now provide our reasons.

THE PROSECUTION'S CASE

[6] Briefly, Sjn Samsaimee bin Yusof ('SP6') and Kpl Rahimi Mohd Nor ('SP7') were on duty at KM 160, Lebuhraya Utara Selatan when SP6 noticed a Nissan Central JLD 4060 driven in a suspicious manner. The car was stopped. It was driven by the first appellant. The second appellant was the front passenger.

[7] SP6 searched the boot of the car. He found a greenish blue bag ('exh P5A'). Inside P5A, SP6 found 15 packages wrapped in Chinese newspaper containing substance suspected to be dangerous drugs ('exhs P10–P24B'). Both the appellants were said to be 'gelisah'. The first appellant was said to 'minta tolong' and 'minta settle'. Both the appellants attempted to flee. The first appellant was immediately arrested. The second appellant fled with the car and crashed into a lorry. He then fled on foot but was subsequently arrested.

[8] The appellants and the exhibits were brought to the police station at Yong Peng. At the police station, the first appellant was physically searched

where the drugs which formed the subject matter of the possession charges were recovered from a LV purse. The purse was found in the jeans that the first appellant wore.

[9] The appellants and the exhibits were handed over to Insp Rosilawati bt Jusoh, the investigating officer ('SP9'). SP9 later sent the 15 packages recovered from the car and the drugs recovered from the first appellant's person to the chemistry department for analysis.

[10] Azmira bt Abd Rahman, the chemist ('SP2') testified that she received the drug exhibits from SP9. Upon analysis of the exhibits, SP2 confirmed the type and quantity of the drugs which formed the subject matter of the trafficking and the possession charges. Heroin, monoacetylmorphines, methamphetamine and nimetazepam are listed in the First Schedule to the Act.

FINDINGS AT THE END OF THE PROSECUTION'S CASE

[11] From the conduct of the appellants, the learned trial judge found that they were in possession of the drugs in the boot of the car and that the element of trafficking had been proved under ss 2 and 37(da) of the Act.

[12] As for the element of common intention, the following was the finding of the learned trial judge (appeal record Vol 1 at p 20):

> 35. Daripada keterangan saksi-saksi Pendakwaan jelas bahawa kedua-dua OKT telah ditahan semasa berada di dalam kereta yang menuju ke suatu destinasi dan dengan membawa dadah-dadah yang telah dibungkus dengan sempurna sebagaimana yang dijumpai oleh SP6. Maka dengan itu adalah jelas bahawa kedua-dua Tertuduh memang mempunyai niat bersama bagi mengedar dadah tersebut. Dengan itu seksyen 34 Kanun Keseksaan telah dipenuhi oleh pihak Pendakwaan.

[13] Having found that the prosecution had made out a prima facie case against the appellants, the appellants were called upon to enter their defence.

THE DEFENCE

[14] Both the appellants gave evidence under oath. Their defence essentially was that they had no knowledge of the drugs found in the boot of the car.

[15] The first appellant testified that the car did not belong to her. On 28 November 2011 at about 11pm, she and the second appellant went to Holiday Plaza, Johor Bahru to borrow the car from her boyfriend, Michael.

The first appellant wanted to go to Genting Highlands to gamble. They reached Genting Highlands at about 4–5am on 29 November 2011 and were there until 10am.

[16] The first appellant stated that at about 9am on 29 November 2011, she received a call from Michael, informing her that he needed the car urgently. She and the second appellant were on their way back to Johor Bahru when they were arrested. The bag exh P5A did not belong to her.

[17] The second appellant gave similar evidence as regards borrowing the car from Michael and the purpose of borrowing the car. The testimony of the second appellant was also consistent with the first appellant in respect of the call from Michael on the urgent need for the car to be sent back.

[18] The second appellant testified that when he borrowed the car from Michael, he did not check the boot of the car. He only checked the meter box and oil filter. The second appellant explained that he fled after the police had discovered the drugs in the boot as he was afraid. He said he knew the sentence for drugs was death.

FINDINGS AT THE CONCLUSION OF THE CASE

[19] The learned trial judge found that the defence of both the appellants was a mere denial and that the identity of Michael was only raised at the defence case. Michael was thus a recent invention and an afterthought.

[20] Adverting to the conduct of both the appellants, the learned trial judge found that the defence of both the appellants had failed to raise a reasonable doubt on the prosecution's case and had failed to rebut the presumption on a balance of probabilities. The appellants were thus convicted and sentenced as aforesaid, hence the appeals.

THE APPEALS

[21] For the first appellant, learned counsel submitted that the learned trial judge erred in the following aspects of his finding at the prima facie case:

(a) on the element of trafficking by invoking both ss 2 and 37(da) of the Act; and

(b) on the element of common intention.

[22] On trafficking, learned counsel highlighted the following finding of the learned trial judge (appeal record Vol 1 at p 19):

33. ... adalah jelas bahawa berat dadah adalah melebihi 15 gram dan dengan itu

anggapan di bawah seksyen 37(da)(iiia) Akta Dadah Berbahaya mahu pun tafsiran di bawah seksyen 2 Akta Dadah Berbahaya boleh diterima pakai bagi menunjukkan kedua-dua OKT telah mengedar dadah seperti mana tafsiran di bawah seksyen 2 Akta Dadah Berbahaya. Dengan itu Pendakwaan telah berjaya mengasaskan satu kes prima facie terhadap kedua-dua OKT bagi pengedaran dadah merbahaya tersebut.

[23] Citing the decision of this court in the case of *Abdul Aziz a/l Jamal v Public Prosecutor* [2016] MLJU 1606; [2016] 6 CLJ 485, learned counsel submitted that the learned trial judge erred in failing to make a specific finding of whether trafficking was proved by way of direct evidence or presumption. Learned counsel submitted that on this ground alone, the appeal ought to be allowed.

[24] In respect of common intention, learned counsel submitted that there was no pre-arranged plan or meeting of mind to conclude that there was common intention between the first and the second appellants to traffic in dangerous drugs. Paragraph 35 of the grounds of judgment quoted above, submitted learned counsel, was not sufficient to prove the element of common intention. *Lany Masangkay Magnaye lwn Pendakwa Raya dan satu lagi rayuan* [2016] MLJU 1607; [2016] 4 CLJ 64 was cited in support of the submission.

[25] As for the defence, learned counsel contended that the learned trial judge had failed to sufficiently evaluate the defence of the first appellant, in particular, that the first appellant had no knowledge of the drugs. The learned trial judge failed to consider that the evidence of the prosecution witnesses on the conduct of the first appellant was challenged and that there was no evidence as to how long the car was used by the first appellant prior to her arrest. Learned counsel urged the court to follow the decision of the Federal Court in the case of *Ibrahim bin Mohamad dan satu lagi lwn Pendakwa Raya* [2011] MLJU 1491; [2011] 4 CLJ 113 where the facts are similar to the present appeals.

[26] For the second appellant, learned counsel adopted the submissions of counsel for the first appellant. Additionally, it was submitted that the conviction of the second appellant was certainly not safe for the following reasons.

[27] The second appellant was only the passenger and not the owner of the car. The second appellant therefore had no custody and control of the car and cannot be said to have custody and control of the drugs in the car.

[28] As for the second appellant's conduct in fleeing, whilst conceding that the learned trial judge was correct to rely on the conduct under s 8 of the Evidence Act 1950, learned counsel submitted that at the highest there was

knowledge but not custody and control of the drugs. Learned counsel also submitted that there was a gap in the prosecution's case as the owner of the car was not called to testify.

[29] On common intention, learned counsel submitted that there must be a finding by the learned trial judge of a pre-arranged plan which preceded the act constituting the offence, which in this case, there was none. Learned counsel further submitted that there was an error in the finding of the learned trial judge that both the appellants were carrying the dangerous drugs in the car. The second appellant did not carry the dangerous drugs because he was not the driver of the car.

[30] The final issue canvassed by learned counsel for the second appellant was that the defence of the second appellant was not considered at all by the learned trial judge. The second appellant had given his explanation as to why he fled. The learned trial judge was duty bound to consider the explanation given by the second appellant under s 9 of the Evidence Act 1950 but His Lordship failed to do so and this failure, submitted learned counsel, amounted to a serious misdirection.

OUR FINDINGS

[31] Learned counsel for the first appellant relied on the case of *Abdul Aziz Jamal,* to contend that the misdirection of the learned trial judge in applying both ss 2 and 37(da) warranted the appeals to be allowed. In *Abdul Aziz Jamal,* this court found that the learned trial judge had seriously misdirected himself on several aspects. The first aspect was when His Lordship stated on one hand that his finding was made independent of the statutory presumptions, yet on the other hand he invoked the statutory presumption. The second aspect was when the learned trial judge invoked not the presumption of either possession or trafficking but both presumptions of possession and trafficking and the third aspect of the misdirection was when the learned trial judge failed to rule at the end of the defence case whether the appellant had rebutted the presumptions.

[32] We were not persuaded that these appeals ought to be allowed on this ground alone. Suffice to state that we did not find the infirmities as in *Abdul Aziz Jamal*, in the instant appeals. The learned trial judge in these appeals found at the end of prosecution's case that the element of trafficking had been proved under s 37(da)(iiia) and at the end of the defence case, His Lordship had addressed his mind correctly on the burden of the appellants to rebut the presumption on a balance of probabilities.

[33] Nevertheless, we found merits in the complaint that the learned trial judge had failed to adequately consider the defence of the appellants and we further found that the facts and circumstances of the present appeals fit into the judgment of the Federal Court in the case of *Ibrahim Mohamad*.

[34] In *Ibrahim Mohamad,* the accused persons were apprehended at a road block during the inspection of a vehicle driven by the first accused. Neither the first nor the second accused was the owner of the vehicle. At the back seat of the vehicle, police discovered 40 transparent plastic packages of cannabis. Both the accused were convicted and sentenced to death under s 39B(1)(a) of the Act for trafficking in 38,499g of cannabis. Their conviction and sentence was affirmed by this court but was set aside by the Federal Court. The Federal Court found that the conviction of both the accused on the charge of trafficking was not safe. The conviction and sentence of the court below was thus set aside and substituted with one of possession under s 6 of the Act punishable under s 39A(2) of the Act read with s 34 of the Penal Code. For ease of reference, we reproduce below the relevant passages of the judgment of the Federal Court:

> [7] In the present case the only evidence which the learned trial judge had relied upon in order to conclude that both the accused were in custody or control of the drugs are as follows:
>
> (i) that the first accused was the driver of the vehicle and the second accused was the passenger on the date of his arrest;
>
> (ii) that the second accused was previously summoned for driving the vehicle without licence in Kulim, Kedah on 14 May 1999, about six months prior to the date of his arrest in the present case.
>
> [8] We are of the view notwithstanding the fact that the first accused and the second accused were in the vehicle when it was stopped at the road block for inspection, neither the first accused nor the second accused was the registered owner of the vehicle. ...
>
> ...
>
> ...
>
> [14] The mere fact that the second accused was found in the vehicle and that he was previously summoned for driving the vehicle somewhat approximately six months prior to the date of arrest are insufficient for the court to make an inference that he had exclusive custody or control over the vehicle. Even if the learned trial judge was correct in deciding that both the accused were in custody or control of the vehicle when they were stopped by the police party, this could not be translated into having custody or control over the said drugs in the absence of other incriminating evidence against them. It could not have given rise to the inference that the said drugs belonged to them (see the case of *PP v Lin Lian Chen* [1992] 2 MLJ 561; [1992] 4 CLJ 2086; [1992] 1 CLJ Rep 285).
>
> [15] The law is well settled that having only custody or control over the said drugs is insufficient to establish 'possession'. The physical act of custody and control must be accompanied with evidence that the accused had knowledge of the said drugs. In

A the absence of any statutory presumption, knowledge has to be proved either by direct evidence or circumstantial evidence. Mere knowledge alone without exclusivity of either physical custody or control or both is insufficient in law to constitute possession, let alone trafficking (see the case of *Chan Pean Leon v PP* [1956] 1 MLJ 237; [1956] 1 LNS 17).

B [16] In the present case, the learned trial judge made the inference that both the accused had knowledge of the said drugs by relying on their conduct after they were arrested in particular their act of fleeing from the scene. This was affirmed by the Court of Appeal. On this point we are of the view that the trial judge had clearly overlooked the other inferences that could have been made from the act of fleeing or C absconding. Where there are two or more inferences that could be made the inference most favourable to the accused must be drawn (see the case of *PP v Mohd Radzi Abu Bakar* [2006] 1 CLJ 457).

[17] Whilst the conduct of the accused fleeing the scene may be a relevant factor to be considered, such a conduct however must be weighed against the circumstances D of the case. ... As regards the present case it is noted that the road leading to the 'road block' is a straight road and therefore the first accused being the driver of the vehicle could have clearly seen the 'road block' miles away. The fact that the first accused did not make a u-turn or attempt to run away before approaching the 'road block' can give rise to an inference that both the first and the second accused had no knowledge E of the drugs in the vehicle.

[35] The Federal Court found that both the accused had given sufficient explanation as to their conduct of running away from the scene of the crime, namely that they heard the prosecution witnesses saying 'ada ganja' during the F inspection of the vehicle and it was only at that moment that both of them ran away. The Federal Court ruled that both the accused had discharged the onus of explaining their conduct as provided for under s 9 of the Evidence Act.

G **[36]** Likewise in the present appeals. We found that it was not safe to sustain the conviction on the charge of trafficking against both the appellants on similar grounds as stated in the case of *Ibrahim Mohamad*.

[37] Although we agreed with the learned trial judge that the identity of H Michael was only raised at the defence case and was thus correctly labelled by the learned trial judge as an afterthought and a recent invention, we found quite apart from the issue of Michael, the learned trial judge had failed to consider that from the evidence before the court, it was clear that neither the first nor the second appellant was the owner of the car.

I

[38] As for conduct, the first appellant had challenged the prosecution's version and even if the court were to accept the prosecution's evidence that the first appellant 'minta tolong' and 'minta settle', there was no evidence to establish that the words uttered was in specific reference to the drugs found in

the boot of the car. An inference favourable to the first appellant may be drawn that the words uttered were in relation to the manner she was driving the car.

[39] Further, similar to the facts in *Ibrahim Mohamad*, the appellants, upon noticing the police patrol car at the highway, could have accelerated without stopping if they had knowledge of the drugs in the boot of the car. But they co-operated with the police and the second appellant had given his explanation that he only fled upon hearing about the drugs from the police, which explanation was not considered by the learned trial judge. As in *Ibrahim Mohamad,* we similarly found that the second appellant had discharged the onus of explaining his conduct under s 9 of the Evidence Act.

[40] We therefore unanimously allowed the appeals. The conviction and sentence of the High Court on the charge of trafficking was set aside and substituted with one of possession under s 12(2) of the Act and punishable with s 39A(2) read with s 34 of the Penal Code. We sentenced the appellants to 18 years imprisonment from the date of their arrests. In the circumstances we do not see the need for us to discuss the issue of common intention raised by the appellants.

Appeals allowed and conviction and sentence set aside and substituted with one of possession under s 12(2) of the DDA.

Reported by Kanesh Sundrum